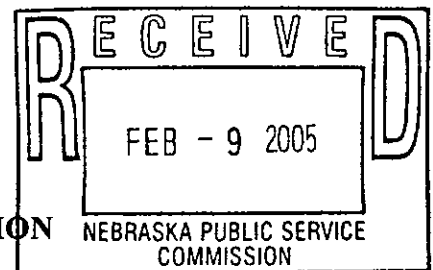


**BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION**



In the Matter of the Nebraska Public)	
Service Commission, on Its Own)	
Motion, Investigating Whether To)	Docket. NUSF-41
Assess the Nebraska Universal Service)	
Fund Surcharge on Broadband Services)	

COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("Time Warner Cable") respectfully submits these comments in response to the *Order Opening Docket and Setting Public Hearing*, in which the Commission requested comment on "the propriety of assessing the Nebraska Universal Service Fund . . . surcharge on broadband services including but not limited to cable modem . . . services."¹ Time Warner Cable is the Nation's second-largest cable operator. Its Nebraska division operates cable systems in Lincoln, Fremont, and a number of other franchise areas.² Time Warner Cable provides so-called cable modem service, which is high-speed Internet service. Time Warner Cable believes that it would be inappropriate to impose a universal service assessment on revenue derived from that service, for the three reasons explained below.

I. THE FEDERAL UNIVERSAL SERVICE STATUTE PROHIBITS STATES FROM IMPOSING A UNIVERSAL SERVICE FEE ON REVENUE DERIVED FROM CABLE MODEM SERVICE.

Under the federal universal service statute, the FCC is charged with creating a federal universal service fund supported, "on an equitable and nondiscriminatory basis,"

¹ *In the Matter of the Nebraska Public Service Commission, on its own motion, investigating whether to assess the Nebraska Universal Service Fund surcharge on broadband services*, Order Opening Docket and Setting Public Hearing, Application No. NUSF-41, at 1 (Neb. PSC Dec. 14, 2004).

² See <http://www.timewarnercable.com/nebraska/aboutus/ourtowns.html>.

by assessments on “every telecommunications carrier that provides interstate telecommunications services.”³ The same statute permits “[a] State [to] adopt regulations . . . to preserve and advance universal service,” so long as only “a telecommunications carrier that provides intrastate telecommunications” is made to contribute “on an equitable and nondiscriminatory basis,” and so long as the state mechanism does “not rely on or burden Federal universal service support mechanisms.”⁴

The combination of these provisions — and the backdrop of the general principle that the FCC is limited to regulating interstate service while state commissions are confined to regulating intrastate service⁵ — has been interpreted to prohibit the FCC from levying assessments on revenue derived from intrastate services,⁶ and to prohibit state commissions from assessing revenue derived from interstate services.⁷ The FCC has

³ 47 U.S.C. § 254(d).

⁴ *Id.* § 254(f).

⁵ *Id.* §§ 151, 152.

⁶ See *Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393, 448 (5th Cir. 1999) (“we reverse that portion of the Order that includes intrastate revenues in the calculation of universal service contributions”).

⁷ See *AT&T Corp. v. PUC of Texas*, 252 F. Supp. 2d 347, 352 (W.D. Tex. 2003) (state USF regime assessing revenue derived from interstate service “conflicts with Section 254(f) by burdening the [federal] USF mechanisms and is thus preempted”), *aff’d*, *AT&T Corp. v. PUC of Texas*, 373 F.3d 641, 647 (5th Cir. 2004) (“we conclude, consistent with our decision in TOPUC, that the PUC assessment of interstate and international calls is discriminatory, conflicts with § 254(f), and thus is preempted by federal law”); *AT&T Communications, Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1124 (D. Ore. 2001) (“Because the Oregon surcharge relies on interstate revenues also assessed to contribute to the federal universal support fund, it burdens federal universal support mechanisms.”); *TUSF Administration*, Project No. 21208, 2004 WL 1790871 (Texas. PUC July 29, 2004) (“The interim changes in this order are in response to the Fifth Circuit Court of Appeals’ decision in *AT&T Corp. v. Public Utility Commission of Texas*, 2004 WL 1334688 (5th Cir. 2004) that Texas’s assessing of interstate and international calls for purposes of TUSF is preempted by federal law.”); *Golden Belt Tel. Ass’n, Inc.*, Docket No. 04-GNBT-130-AUD, 2004 WL 1944128, at *4 (Kans. SCC July 19, 2004)

determined that cable modem service is a purely interstate service.⁸ Thus, revenue derived from cable modem service is off-limits to state universal service funds.

Moreover, the federal statute allows states to assess only a “telecommunications carrier.”⁹ That term is defined as a “provider of telecommunications services.”¹⁰ “Telecommunications service,” in turn, is defined as “the offering of telecommunications for a fee directly to the public.”¹¹ “Telecommunications,” finally, is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹² Interpreting these terms, the FCC has held that cable modem service does

(“Kansas requires all telecommunications service providers to contribute to the KUSF through an assessment on intrastate retail services only. No assessment is made on service providers’ international and interstate receipts. This assessment does not violate 47 U.S.C. § 254(f).”).

⁸ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 59 (2002) (“cable modem service is an interstate information service”).

It is true that the Ninth Circuit reversed the FCC’s order. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). But the reversal was based on a different ground: that the Ninth Circuit felt compelled by prior precedent to hold that cable modem service contains a separate “telecommunications service” component. The Ninth Circuit nowhere disagreed with the FCC’s finding that cable modem service is 100% interstate. Besides, the Supreme Court has granted certiorari, see 125 S. Ct. 654, 655, and is expected to overturn the Ninth Circuit’s decision, see Legg Mason, *Washington Telecom & Media Insider*, *Winter “Cheat Sheets” for Telecom & Media Policy*, Feb. 7, 2005, at 8 (“Supreme Court more likely than not to overturn Ninth Circuit”).

⁹ 47 U.S.C. § 254(f).

¹⁰ *Id.* § 153(44).

¹¹ *Id.* § 153(46).

¹² *Id.* § 153(43).

not contain a separate “telecommunications service” component.¹³ Insofar as a cable operator provides cable modem service, then, it is not a “telecommunications carrier,” and may not be assessed a universal service fee.¹⁴

II. THE NEBRASKA TELECOMMUNICATIONS UNIVERSAL SERVICE FUND ACT DOES NOT PERMIT THE COMMISSION TO ASSESS A UNIVERSAL SERVICE FEE ON CABLE MODEM SERVICE.

The Nebraska Telecommunications Universal Service Fund Act provides that the Commission may require only a “telecommunications company” to contribute to the universal service fund.¹⁵ “Telecommunications company” is defined as a company “offering telecommunications service for hire *in Nebraska intrastate commerce*.”¹⁶ As the Commission has previously determined, this language — no doubt inspired by the

¹³ See *Declaratory Ruling* ¶ 33 (“We conclude that cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs.”).

¹⁴ Because the Commission has inquired only about the propriety of assessing a universal service fee on all forms of broadband service, we need not address a fee imposed only on cable modem service. Suffice it to say that such a fee would be preempted for an additional reason: it would run afoul of 47 U.S.C. § 542(b), which strictly limits impositions targeted at cable operators. See generally *Time Warner Cable v. City of Rochester*, No. 03 Civ. 6257 (DGL) (W.D.N.Y. Dec. 22, 2003); *City of Chicago v. AT&T Broadband, Inc.*, No. 02 C 7517, 2003 WL 22057905 (N.D. Ill. Sept. 4, 2003); *Parish of Jefferson v. Cox Communications Louisiana, LLC*, No. Civ. A 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003).

¹⁵ Neb. Rev. Stat. § 86-324(2)(d) (“[T]he commission . . . [s]hall require every *telecommunications company* to contribute to any universal service mechanism established by the commission pursuant to state law.”) (emphasis added); see also *id.* § 86-323(4) (“The Legislature declares that it is the policy of the state to preserve and advance universal service based on the following principles: . . . (4) All *providers of telecommunications services* should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service . . .”) (emphasis added); *id.* § 86-326 (“The administrator shall . . . notify *telecommunications companies* of their obligations to the fund . . .”) (emphasis added); *id.* (“Any *telecommunications company* not meeting its obligation to the fund shall [be subject to sanctions].”) (emphasis added).

¹⁶ *Id.* § 86-322 (emphasis added); see also *id.* § 86-119 (to similar effect).

federal prohibition against assessing interstate revenue — makes clear that revenue from interstate service may not be assessed.¹⁷ As already explained, cable modem service is an interstate service. Thus, assessing revenue derived from cable modem service is prohibited as a matter of not only federal law but also Nebraska law.

Similarly, a cable operator offering cable modem service can be an assessable “telecommunications company” only if cable modem service is a “telecommunications service,”¹⁸ a term whose definition is for all practical purposes identical to the federal definition addressed above.¹⁹ As already explained, the FCC has held that cable modem service does not involve a separate “telecommunications service” component. Courts in this state customarily view interpretations of federal statutes as persuasive authority in interpreting Nebraska statutes with identical wording.²⁰ Thus, courts will likely follow the FCC, and will conclude that this Commission is powerless to burden cable modem service with a universal service assessment.

¹⁷ See Neb. Admin. Code § 291-10-002.01D1 (“The NUSF surcharge shall not be assessed on interstate telecommunications services.”).

¹⁸ Neb. Rev. Stat. § 86-322 (“Telecommunications company means any [firm] offering *telecommunications service* . . .”) (emphasis added)

¹⁹ *Id.* § 86-121 (“Telecommunications service means the offering of telecommunications for a fee.”); *id.* § 86-117 (“Telecommunications means the transmission, between or among points specified by the subscriber, of information of the subscriber’s choosing, without a change in the form or content of the information as sent or received.”).

²⁰ See, e.g., *State v. Myers*, 258 Neb. 273, 280, 603 N.W.2d 390, 398 (1999) (holding that, because language of state and federal wiretap statutes were virtually identical, the court should adhere to federal case law in construing the state statute); *Heath Consultants, Inc. v. Precision Instruments, Inc.*, 247 Neb. 267, 272, 527 N.W.2d 596, 601 (1995) (“federal cases interpreting federal legislation which is nearly identical to the Nebraska [Unlawful Restraint of Trade] act constitute persuasive authority”).

III. EVEN IF THE COMMISSION HAD AUTHORITY TO IMPOSE A UNIVERSAL SERVICE FEE ON CABLE MODEM SERVICE, IT SHOULD DECLINE TO EXERCISE IT.

The FCC has noted that “[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public.”²¹ Consistent with that sentiment, the Nebraska Legislature has created the Nebraska Internet Enhancement Fund, the purpose of which is “to provide financial assistance to install and deliver broadband or other advanced telecommunications infrastructure and service throughout the state.”²² In other words, the Legislature has singled out broadband service for subsidization. It would be fatally inconsistent with that statutory initiative to single out broadband service for a special assessment.

Moreover, there simply is no cause for considering any such step at this time. It appears that the Commission’s potential interest in levying a universal service fee on revenue derived from broadband finds its origin in the Commission’s rulemaking

²¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 1 (2002) (“*Wireline Broadband NPRM*”) (footnotes omitted); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 212 (2003) (“development of broadband infrastructure . . . is vital to the long-term growth of our economy as well as our country’s continued preeminence as the global leader in information and telecommunications technologies”); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 3 (2004) (“we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people”) (footnote omitted).

²² Neb. Rev. Stat. § 86-579.

concerning Voice over Internet Protocol (“VoIP”) service, reflects the concern that VoIP service may gradually replace traditional circuit-switched telephone service, and is rooted in the fear that the FCC will not permit states to impose universal service fees on revenue derived from that service.²³ But whether state USF fees may be levied on VoIP service is currently being considered by the FCC.²⁴ Unless and until the FCC holds that VoIP service is immune from universal-service levies, there is no cause to consider taking the far-reaching step of assessing broadband revenues.

Besides, even if the FCC holds that VoIP service is immune, there will be time enough to consider alternatives less drastic than assessing cable modem service. Voice bits currently comprise only a tiny fraction of all bits transported via broadband services; the vast majority of bits represent data.²⁵ Thus, assessing broadband service out of

²³ See *In the Matter of the Nebraska Public Service Commission, on its own motion, investigating whether to assess the Nebraska Universal Service Fund surcharge on broadband services*, Order Opening Docket and Setting Public Hearing, Application No. NUSF-41, at 1 (Neb. PSC Dec. 14, 2004) (“The Commission is considering the assessment of broadband services and/or connections as a result of the testimony given by Mr. Pursley at the December 8, 2004, hearing in Docket NUSF-40, which is the Commission’s investigation regarding Voice Over the Internet Protocol (VoIP) providers.”); NUSF-40 Testimony of Jeffrey L Pursley, December 8, 2004, at 1 (available at <http://www.psc.state.ne.us/home/NPSC/usf/Orders/NUSF-40.2004.12.08.Hearing%20Exhibit%206%20-%20Pursley%20Testimony.doc.rtf>) (“The FCC cannot then be allowed to turn around and prevent States from the funding base needed to fulfill our obligations.”).

²⁴ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 63-66 (2004).

²⁵ See, e.g., *Don’t Blame Telecom Act; Blame its Enforcement: The ‘Father of the Internet’ Speaks Out on Regulatory Changes*, Telecom Policy Report, Aug. 4, 2004, available at http://www.findarticles.com/p/articles/mi_m0PJR/is_30_2/ai_n6144369 (“Current networks today are dominated by data. First of all, the amount of voice traffic is probably not more than 20 percent of the amount of data traffic currently being moved on the network. So, most of the bits being carried are non-voice bits”) (quoting Vinton Cerf).

frustration for being unable to assess VoIP service would be like “us[ing] a tank to block a mousehole.”²⁶ Such an approach not only is unlikely to find favor with reviewing courts, but also lacks any sound basis in policy.

Conclusion

For the reasons set forth above, the Commission should decline to impose a universal service fee on revenue derived from cable modem service.

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²⁶ *Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 593 (D.C. Cir. 2002) (“Ordinarily, of course, the Commission is entitled to some deference on its choice of remedy,” but not where it “has used a tank to block a mousehole”).